IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HARVILL PAYNE RICHARDSON **APPELLANT**

VS. **NO. 2012-KA-1158-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

This is Harvill Payne Richardson's "Appellant" direct appeal attacking the judgment of the Circuit Court of Harrison County, Mississippi. On May 26, 2011, a Harrison County jury convicted Appellant for his felony of murder. The circuit court sentenced Appellant to serve a term of life imprisonment in the custody of the Mississippi Department of Corrections.

STATEMENT OF THE FACTS

On the evening of October 20, 2009, Alex Dubaz, a Biloxi Police Department 911 dispatcher, answered Edith Richardson's (Appellant's Wife) call. Tr. 253-54. Edith was frantic and unable to communicate with Ms. Dubaz. See St.'s Ex. 12. Appellant took the phone from Edith and began to convey the events that prompted the call. *Id.* Appellant shot Rudolpho "Rudy" Quilon. *Id.* Help arrived approximately five minutes later. Tr. 259-60.

Biloxi Police Department Officer James Roberts was the first to arrive at Appellant's home. *Id.* He found Appellant on the phone with Ms. Dubaz. *Id.* Officer Roberts ended the call. Appellant, Edith and Edith's brother were taken to the Biloxi Police Department. Tr. 263. There,

law enforcement officers interviewed Appellant, Edith and her brother. Gunshot residue "GSR" samples were taken from all three. Investigator Michael Brown interviewed Edith and her brother. Tr. 263-65, 266; *see also* St.'s Ex. 13 and 14.

During her interview with Officer Brown, Edith recalled the events of that night. Appellant and Rudy Quilon were laughing, drinking beer and smoking cigarettes on the back patio when she interrupted. Tr. 320, 322, 324. Edith decided to turn in for the night, and wanted to let them know. Tr. 321. At that time, Rudy Quilon told Edith that he wanted to have sex with her. Edith made light of the comment, because she knew Appellant was upset. She said her goodnights, then left.

A few minutes later, Appellant entered their bedroom and walked to his night-stand. Tr. 326, 338. Appellant told Edith he "was gonna tak[e] care of [Rudy]" that night. He pulled one of the night-stand's drawers open, produced a .44 magnum revolver and made his way towards the patio. Tr. 326, 338-39. Edith alerted Rudy Quilon and asked him to leave, immediately. Tr. 329, 338. Appellant returned to find Rudy Quilon in the backyard. Tr. 339. Appellant took one step off the patio into the backyard and fired two shots. His first was a warning. Tr. 341. His second struck Rudy Quilon in the stomach. *Id.* Edith dialed 911. Tr. 253.

On March 15, 2010, a Harrison County grand jury indicted Appellant on one count of murder in violation of Section 97-3-19(1)(a) of the Mississippi Code of 1972, Annotated. C.P. 7. He waived formal arraignment and pleaded NOT GUILTY. C.P. 12. Trial was set for June 7, 2010, but was subsequently reset an additional four times. C.P. 13, 17, 22, 38.

On February 17, 2011, the State filed a Motion to Exclude Appellant's expert witnesses, and a Motion to Limine to exclude testimony or reference to Rudy Quilon's 1976 and 1985 felony convictions. C.P. 23-23; 32-33. The State also delivered two GSR reports to Appellant that day. Tr. 8, 12-13.

On March 21, 2011, the circuit court granted Appellant a continuance to develop expert testimony related to the GSR reports, even though the reports were not newly discovered. Tr. 24-28. Additionally, the circuit court ordered: (1) all witnesses be disclosed by April 25, 2011; and, (2) trial was set for May 23, [sic] 2011. C.P. 38.

On May 24, 2011, the circuit court heard arguments, pre-trial. The State's Motion in Limine, including a motion *ore tenus* to redact a portion of the 911 conversation, was granted. Tr. 80, 83-84. Appellant proffered his testimony about Rudy Quilon's criminal history. Tr. 98-112. Rudy Quilon threatened Appellant with past bad acts as a means of intimidation. Tr. 104, 107. But, Appellant admitted he was unaware of Rudy Quilon's past until discovery. Tr. 104, 107, 109-12. He chose to limit his proffer to Rudy Quilon's past; and, chose not to testify. Tr. 113-14. Further, Appellant proffered no testimony of an overt act committed on behalf of Rudy Quilon. *Id.* The circuit court's ruling stood. Tr. 115-19. The evidence Appellant sought to introduce as evidence was predicated on showing an overt act committed by Rudy Quilon. Tr. 116-19, 200.

After voir dire but prior to the seating of the jury, Appellant raised a motion *ore tenus* concerning potential juror bias. Tr. 195-96. Appellant sought to voir dire the jury concerning any juror bias as a consequence of Appellant being related local law enforcement officers. *Id.* Appellant moved for mistrial in the event the motion was overruled. *Id.* The circuit court overruled the objection. Tr. 197.

Appellant proffered his position on two points after the jury was dismissed for the night Tr. 200-03. First, Appellant proffered the Mississippi State Supreme Court's decisions in *Sanders v. State*, 77 So.3d 484 (Miss. 2012) and *Newell v. State*, 49 So.3d 66 (Miss. 2010) in relation to Rudy Quilon's threats and his prior acts of violence. Tr. 200. Next, Appellant proffered statements concerning Post-Traumatic Stress Disorder "PTSD," but indicated PTSD would not be apart of any

defense raised at trial. Tr. 202-03.

On May 25, 2011, proceedings began with Appellant raising a motion *ore tenus* seeking a continuance due to an inability to effectively communicate with trial counsel. His hearing aids malfunctioned. Tr. 205-216. The circuit court provided Appellant audio assistance and denied the motion. Tr. 214-15. Appellant raised a similar motion *ore tenus* seeking a continuance, because he was unable to mute his voice. Tr. 217-19; 331. The motion was denied. Tr. 219-20.

During his opening statement, Appellant began referencing the 911 conversation in conjunction with written statements taken by a first-responder. Tr. 229. The State objected, noting that Appellant had not called the officer to testify. *Id.* Appellant argued the statements were his own, and suggested the State call the officer in rebuttal. Tr. 230. The objection was sustained. Tr. 231. The jury was immediately removed from the courtroom, after Appellant stated his expectations of the evidence. *Id.*

Appellant expected the evidence would show: he feared Rudy Quilon; that Rudy Quilon attacked him; and, Appellant defended himself. *Id.* The circuit court asked Appellant whether he was placing a statement before the jury without any intention of testifying. Tr. 232. Appellant's response was that since the 911 conversation would be played, he should be allowed to state to the jury what he believed the evidence would show. Tr. 232-36. He reasonably believed the written statement would be shown by the evidence. *Id.* The circuit court warned against any unilateral presentation to the jury without witness disclosure and cross-examination. Tr. 237-39. The State's objection was sustained. Tr. 237. Appellant had failed to disclose a witness. Tr. 238-39. Appellant moved to proffer the record, but the motion was denied. Tr. 238. Subsequently, Appellant moved for mistrial Tr. 239-40. It too was denied. *Id.* Opening statements resumed.

Again, the State objected on the basis Appellant's statement was argumentative. *Id.* Appellant

pointed to the State's opening statement, claiming the State had presented argument during its opening. *Id.* The circuit court reminded Appellant that there was no contemporaneous objection during the State's opening. Id. Even so, the circuit court overruled the State's objection. Tr. 242.

The State began its case-in-chief by calling, the recently wed, Alexandra Dubaz Snyder. Tr. 253. Ms. Dubaz laid the foundation for introducing and the 911 conversation into evidence as State's Exhibit 12. Tr. 256-57.

Then, the State called Investigator Michael Brown to testify and to lay the foundation for introducing Edith Richardson's October 20, 2009, statement given as State's Exhibit 13. Tr. 265. A transcript of her statement was marked for identification as State's I.D. 14. *Id.* Investigator Brown denied he was lead investigator on October 20, 2009. Tr. 266. He was not on duty, but was called in to help. Tr. 266, 296.

Following Investigator Brown's testimony, Appellant revived his motion with the circuit court seeking to proffer statements concerning his right present his reasonable expectations of the evidence at opening. Tr. 311-12. In addition, Appellant moved for mistrial on the basis that the circuit court fundamentally undermined the fairness of the proceedings. Tr. 314-15. Both motions were denied. *Id.*

Next, Edith Richardson was called to describe the events that occurred the night Appellant shot Rudy Quilon. Tr. 319-330. The State was forced to motion the circuit court with the request she be treated as a hostile witness. Tr. 326. The motion was granted, and the transcript of Edith Richardson's statement was used to refresh her memory. Tr. 326, 327-30. But, the circuit court denied the State motion seeking to present the recorded statement to the jury. Tr. 335, 354-55.

Afterwards, the State called Investigator Britt to testify. Tr. 355. Investigator Britt laid the foundation for marking into evidence, State's Exhibits 1-11 and 15-20. Tr. 358, 360, 367. On

cross-examination, Appellant presented Officer Britt with a line of questioning concerning GSR collection and bullet hole entry. Tr. 376-78, 380-83, 385-86. The State objected repeatedly. Tr. 377-78, 380-83, 385-86. The State's final witness was Dr. Paul McGarry, M.D. Dr. McGarry performed Rudy Quilon's autopsy and was qualified as a forensic pathologist expert witness for the State. Tr. 389. The State rested. Tr. 399, 404.

At that time, Appellant moved for a directed verdict. Tr. 400. Appellant claimed the State failed to prove its case for murder given the State's Castle Doctrine and his conduct as self-defense. *Id.* The circuit court found the elements of murder were shown, and denied Appellant a directed verdict. Tr. 401. Appellant then motioned to recess. *Id.* Appellant informed the circuit court that he was considering resting his case, but needed time to review the evidence. Tr. 402.

On May 26, 2011, the circuit court learned Appellant would not testify. Tr. 404. Appellant rested his case without calling a single witness. Tr. 405. During the State's closing argument, Appellant objected on three occasions. First, Appellant objected the State's reference to Rudy Quilon's family being sorry. Tr. 476. However, the circuit court issued no ruling either way. *Id.* Later, Appellant objected to the State's refreshing its recollection as to Edith Richardson's testimony according to her October 20, 2009 statement. Tr. 478. The objection was overruled. *Id.* Finally, Appellant objected, but failed to specify the contention of his objection. Tr. 479. It too was overruled. *Id.*

Following closing arguments, Appellant motioned for mistrial on two of the three objections raised at closing. Tr. 482-83. The circuit court denied the motion. Tr. 487. A Harrison County convicted Appellant of murder. C.P. 104; Tr. 488. The circuit court sentenced Appellant to serve life imprisonment. C.P. 105-106; Tr. 490.

On June 6, 2011 Appellant filed a Motion for JNOV & in the Alternative a Motion for New

Trial and Finding that the Verdict is Against the Overwhelming Weight of the Evidence. C.P. 116-18. On July 3, 2012, a hearing took place in the circuit court based on Appellant's motion for JNOV & in the Alternative a Motion for New Trial. Appellant incorporated all of his objections at trial into the motion. Tr. 492-522. Appellant's direct appeal is presently before this Court.

STATEMENT OF THE ISSUES

I. WHETHER THE CIRCUIT COURT EXERCISED SOUND DISCRETION BY EXCLUDING RUDY QUILON'S PRIOR CONVICTIONS AND TESTIMONY OR REFERENCES RELATED TO THOSE CONVICTIONS.

II. WHETHER THE CIRCUIT COURT EXERCISED SOUND DISCRETION BY LIMITING THE CONTENT OF OPENING STATEMENTS TO WHAT THE PARTIES REASONABLY EXPECTED THE EVIDENCE WOULD SHOW.

III. WHETHER JUDICIAL BIAS AND PROSECUTORIAL MISCONDUCT HAD A CUMULATIVE, ADVERSE EFFECT ON APPELLANT'S RIGHT TO A FAIR TRIAL.

IV. WHETHER THE CIRCUIT COURT ERRED ON THE ISSUE OF POST-TRAUMATIC STRESS SYNDROME AS BASIS FOR A DEFENSE OF IMPERFECT SELF-DEFENSE WHERE APPELLANT NEVER RAISED THE ISSUE BEFORE THE COURT.

SUMMARY OF ARGUMENT

I. YES, THE CIRCUIT COURT EXERCISED SOUND DISCRETION BY EXCLUDING RUDY QUILON'S PRIOR CONVICTIONS AND TESTIMONY OR REFERENCES RELATED TO THOSE CONVICTIONS.

II. YES, THE CIRCUIT COURT EXERCISED SOUND DISCRETION BY LIMITING THE CONTENT OF OPENING STATEMENTS TO WHAT THE PARTIES REASONABLY EXPECTED THE EVIDENCE WOULD SHOW.

III. APPELLANT RECEIVED A FAIR TRIAL FREE FROM JUDICIAL BIAS AND PROSECUTORIAL MISCONDUCT OR CUMULATIVE EFFECT.

IV. THERE WAS NO ERROR WHERE CIRCUIT COURT DID NOT RULE ON THE ISSUE OF POST-TRAUMATIC STRESS SYNDROME AS BASIS FOR A DEFENSE OF IMPERFECT SELF-DEFENSE.

ARGUMENT

I. WHETHER THE CIRCUIT COURT EXERCISED SOUND DISCRETION BY EXCLUDING RUDY QUILON'S PRIOR CONVICTIONS AND TESTIMONY OR REFERENCES RELATED TO THOSE CONVICTIONS.

Yes. The issue is whether the circuit court's evidentiary ruling constituted an abuse of discretion; and, whether that ruling had an adverse effect on Appellant's right to a fair trial. In his first assignment of error, Appellant claims he was denied the right to a fair trial, and asks this Court to grant a new trial. The State disagrees.

The record shows Appellant provoked the difficulty with Rudy Quilon. As an initial aggressor, he was precluded from a defense of self-defense. In addition, the Castle Doctrine's presumption of reasonable fear did not apply in this case. Appellant bore the burden to provide some factual basis of an overt act that would justify his use of deadly force.

With no suggestion of an overt act, the circuit court properly excluded the evidence Appellant sought to introduce. The record shows Appellant offered irrelevant character evidence, whose prejudicial effect substantially outweighed its probative value. The circuit court exercised sound discretion by excluding it.

A. Appellant provoked the difficult with Rudy Quilon, which precluded a defense of self-defense.

On appeal, Appellant maintains he "armed himself . . . [and] demanded that [Rudy Quilon] immediately vacate his home, when Quilon advised [Appellant] that he desired to have sex with [Appellant's] wife." App. Br. 58. Rudy Quilon's lewd statement – albeit offensive – on its own, does not raise a factual self-defense question. *Wadford v. State*, 385 So.2d 951, 955 (Miss. 1980).

Appellant was the initial aggressor. "'When a person provokes a difficulty, arming himself in advance, and intending, if necessary, to use his weapon and overcome his adversary, he becomes

the aggressor, and deprives himself of the right of self-defense.'" *Chandler v. State*, 946 So.2d 355, 363 (Miss. 2006) (emphasis added) (quoting *Parker v. State*, 401 So.2d 1282,1286 (Miss. 1981)); *see Simmons v. State*, 805 So.2d 452, 473 (Miss. 2001) (recognizing "the common law rule that an aggressor is precluded from pleading self-defense").

On October 20, 2009, Rudy Quilon, Edith and Appellant were relaxing on the back patio of Appellant's home. Tr. 321. Rudy Quilon told Edith that he wanted to have sex with her. *Id.* Appellant left the back patio, armed himself and returned. Tr. 326. Appellant told Edith that he "was gonna tak[e] care of [Rudy]" that night. Tr. 328, 338-39. Then, Appellant and Edith made their way through the house to the back patio. Tr. 339. Rudy Quilon retreated to the backyard. Appellant followed him there, and fired two shots. The second shot fatally wounded Rudy Quilon.

Even if Rudy Quilon had provoked the initial altercation, Appellant renewed a subsequent altercation. Under this Court's precedent, nothing changes.

> A plea of self-defense is of no avail, notwithstanding the deceased provoked the original quarrel with the accused, where, after that quarrel had ended, and there had been a cessation of the conflict, or the deceased had withdrawn therefrom, a subsequent difficulty was provoked or brought about by the accused. He is to be deemed the aggressor for bringing on or renewing the affray, even though, in so doing, he had no intention of killing or doing serious bodily harm.

McGilberry v. State, 797 So.2d 940, 942-943 (Miss. 2001).

In this scenario, the original altercation ended when Appellant left the porch. When Appellant returned, armed, he renewed the altercation as the initial aggressor. *See Id.* (finding a defendant "uneventfully entered and exited a trailer twice where [victim] was watching . . ." television as evidence that the defendant, upon entering the trial a third time, committed murdered, and did not act in self-defense); *see also Chandler*, 946 So.2d at 363.

The burden of affirmatively raising a defense of self-defense at trial rested squarely on

Appellant's shoulders. *Thomas v. City of Tupelo*, 97 So. 522, 523 (Miss. 1923). Appellant was required to show "an urgent actual threat or on a reasonable belief that such threat is actual or imminent." *Johnson v. State*, 29 So.3d 738, 746 (Miss. 2009). The record gives no indication Appellant reasonably believed Rudy Quilon posed an imminent threat to his life or to Edith's. See *Wadford*, 385 So.2d at 955 (requiring evidence of facts and circumstances to show the use of deadly force was justified). Appellant provoked the difficulty which led to Rudy Quilon's death.

1. Appellant was not entitled to the codified Castle Doctrine's presumption of reasonable fear as provided by Section 97-3-15 of the Mississippi Code

Appellant claims he was entitled to the Castle Doctrine's presumption of reasonable fear codified at Section 97-3-15 of the Mississippi Code of 1972, Annotated. Appellant cites *Sanders v. State* and *Newell v. State* as the bases of his claim. *Sanders*, 77 So.3d at 487; *Newell*, 49 So.3d 66, 75-78 (Miss. 2010). The Castle Doctrine's presumption of reasonable fear did not apply in this case. Section 97-3-15(3) states, in part:

> This presumption shall *not* apply if the person against whom defensive force was used has a right to be in or is a lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or is the lawful resident or owner of the dwelling, vehicle, business, place of employment or the immediate premises thereof or if the person who uses defensive force is engaged in unlawful activity or if the person is a law enforcement officer engaged in the performance of his official duties . . .

Miss. Code Ann. § 97-3-15(3). The Castle Doctrine's presumption does not apply in situations where the one claiming defense force was the initial aggressor. *Newell*, 49 So.3d at 74 (citing Miss. Code Ann. § 97-3-15(3), (4)). Similarly, the presumption does not apply in cases where deadly force is used against a person who has a "right to be in or is a lawful resident . . . of the dwelling " *Sanders*, 77 So.3d at 487 (citing Miss. Code Ann. § 97-3-15(3)).

First, Rudy Quilon had a right to be in Appellant's home the night he was murdered.

Appellant invited Rudy Quilon into his home. Rudy Quilon stored his personal property in a private room inside Appellant's home for approximately five months. At the time of the shooting, Rudy Quilon was in Appellant's backyard, which was secured by a locked gate. See St.'s Ex. 12 (Appellant directing another to unlock the gate to the backyard). Prior to the shooting, the two men were talking outside on the back patio of Appellant's home.

Second, Appellant was the initial aggressor, and was not entitled to the presumption ofreasonable fear. *Newell*, 49 So.3d at 74. Appellant removed himself from a conversation with Rudy Quilon, but only for the purpose of arming himself. He returned and renewed the provocation, then, shot an unarmed Rudy Quilon. This case is distinguishable from *Newell*. The defendant in *Newell* was presumed to have acted in reasonable fear, because: (1) the defendant had a right to be inside his vehicle and the victim did not; and, (2) the victim's overt attempt to remove the defendant from his vehicle; and, the threat, "I'm fixing to cut you up," coupled with his reaching into his pocket prompted the defendant's use of deadly force. *See Newell*, 49 So.3d at 68. Rudy Quilon's conduct did not warrant Appellant's use of deadly force. The record does not indicate Rudy Quilon ever:

> was in the process of unlawfully and forcibly entering, or had unlawfully and forcibly entered, a dwelling . . . the immediate premises thereof or if that person had unlawfully removed or was attempting to unlawfully remove another against the other person's will from that dwelling . . . or the immediate premises thereof and the person who used defensive force knew or had reason to believe that the forcible entry or unlawful and forcible act was occurring or had occurred.

Miss. Code Ann. § 97-3-15(3). In addition, there are no facts in the record indicating Appellant asked Rudy Quilon to leave or no attempted to evict him. Appellant proffered his testimony, and on cross-examination, the State emphasized this point:

> State: When did the victim tell you that he had killed a young lady and killed his cell mate and he was a gang member? When did the victim tell you that he had killed these people.

Appellant: I think it was probably a day or few before, and he talked about using automatic weapons

. . . .

State: And you are saying a few days before he said that he had killed other people, is that what you are saying?

. . . .

What did the police say about what the victim had told you prior to the killing?

Appellant: What?

State: Did you report it to the police, sir? . . . . [D]uring the five months that the victim stayed at your house, before he was killed, you have testified that on numerous occasions, the victim is telling you that he is a killer . . . will kill again, and . . . will hurt your family, correct?

Appellant: No . . . .

Tr. 109-11. Except for Appellant's assertions, there is nothing in the record that would indicate Rudy Quilon was unlawfully in Appellant's home on October 20, 2009.

According to Appellant, he attempted to persuade Rudy Quilon to leave by purchasing Rudy Quilon a vehicle. *Younger v. State*, 931 So.2d 1289, 1291 (Miss. 2006) (stating the rule that the appellant must support a claim of error with supporting fact from the record, not mere assertions of fact expressed in the appellant's brief). Similarly, Appellant claimed he paid Rudy Quilon's apartment rent. *Id.* There are no facts in the record to support either of those assertions.

The record shows that Appellant was the initial aggressor, who used deadly force against one who was lawfully in his home. Appellant was not entitled to the Castle Doctrine's presumption of reasonable fear. As a result, Appellant bore the burden of supporting his defense of self-defense with factual support of an overt act.

B. The circuit court exercised sound discretion by excluding irrelevant, character evidence whose prejudicial effect substantially outweighed its probative value.

The State filed a motion in limine seeking to exclude any testimony or reference to Rudy Quilon's 1976 and 1985 convictions under Rules 401, 403 and 609 of Mississippi's Rules of Evidence. Miss. R. Evid. 401, 403, 609. Without some factual indication of an overt act, the material Appellant sought to introduce was irrelevant, character evidence. Had it been presented to the jury, the evidence would serve only to confuse the issue, mislead the jury, and introduce irrelevant collateral issues. After balancing the probative value against the risk of prejudicial effect, the circuit court made its findings on the record.

The record is clear. The circuit court exercised sound discretion within the scope of the Mississippi Rules of Evidence. Granting the State's motion was not error. The circuit court predicated a theory of self-defense on the Appellant's laying a proper factual foundation of an overt act. *See* Miss. R. Evid. 104(a), (b). "*If and when that bell is rung, then we'll take up the issue . . .*" Tr. 83 (emphasis added). The bell did not ring.

"[A] motion in limine 'should be granted only where the circuit court finds two facts are present: (1) the material or evidence in question will be inadmissible at trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury.'" *McGilberry*, 797 So.2d at 942 (quoting *Whittley v. City of Meridian*, 530So.2d 1341, 1344 (Miss. 1988)); *see also Arrington*, 366 So.2d 246. The analysis below follows the progression of the rule immediately above. The discussion begins with Rules 404 and 405 showing Appellant's evidence was irrelevant. Then, the discussion concludes with a Rule 403 balancing analysis.

Mississippi's appellate courts review a circuit court's decision to admit or exclude evidence for abuse of discretion. *Williams v. State*, 54 So.3d 212, 213 (Miss. 2011). Appellate review of evidentiary rulings is limited solely to a determination as to whether the circuit court abused its

discretion when deciding to admit or exclude evidence. *Jones v. State*, 904 So.2d 149, 157 (Miss. 2005). The circuit court's decision to admit or exclude evidence will not be disturbed, unless a decision adversely affects a substantial right of an accused. *Young*, 99 So.3d at 165 (citing *Hargett v. State*, 62 So.3d 950, 953 (Miss. 2011)).

1. The evidence related to Rudy Quilon's propensity for violence and specific bad acts was inadmissible at trial.

Without any facts to support an over act, the circuit court found evidence of Rudy Quilon's general character for violence and specific prior acts was inadmissible character evidence. "[A] motion in limine 'should be granted only where the circuit court finds [in part] . . . : (1) the material or evidence in question will be inadmissible at trial under the rules of evidence . . . ." *McGilberry*, 797 So.2d at 942 (quoting *Whittle*y, 530So.2d at 1344). Rules 404 and 405 of the Mississippi Rules of Evidence support the circuit court's ruling.

The circuit court predicated admission of the evidence Appellant sought to introduce upon demonstrating some overt act. The circuit court indicated its willingness to consider the evidence provided that bell was rung.

> [I]f it's based on a self-defense defense, there needs to be some overt act prior to getting into any testimony. There's two different things, there's prior convictions and then there is a propensity for violence is what I'm hearing . . . . [T]he prior convictions . . . are irrelevant. The propensity for violence, A, there's no evidence before this court at this time, that I'm aware of, of an overt act on behalf of the victim to justify the self-defense. If and when that bell is rung, then we'll take up the issue . . . . I'm not even aware when the defendant became aware of the prior convictions. What's before the court . . . the victim allegedly made a sexual reference about the declarant's wife, and based on that, the defendant allegedly took what action he took. Based on the victim's conduct in reference to the defendant's wife.
>
> . . . .
>
> It's the Court's ruling that I am going to deny the testimony at this time with regard to, as previously stated, the two convictions from a 1976 as well as a 1985 conviction. I find the too remote in time as to be relevant for this jury to hear.

Tr. 83-84; 93-94. Appellant's character evidence was irrelevant character evidence without some

overt act committed by Rudy Quilon. *See McGilberry*, 797 So.2d at 941-42. Rule 404(a)(2) and its comment, read:

> (a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except ...
> (2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor; Ordinarily a victim's character is irrelevant ....
>
> Under specific circumstances, however, the character of a victim may be relevant. This would most likely arise in instances where the defendant claims that the victim was the initial aggressor and that the actions were in the nature of self-defense. In order to prove this [victim was initial aggressor or defendant's actions were in nature of self-defense] the defendant must offer evidence of an overt act perpetrated against him by the victim.

Miss. R. Evid. 404(a)(2) and cmt. Rule 405 provides the forms of character evidence that may be offered for purposes of proving character. The Rule states that:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or, proof may also be made of specific instances of his conduct.

Miss. R. Evid. 405.

a. *Rudy Quilon's specific bad acts were properly excluded*.

At the May 24, 2011 motion hearing, the circuit court clarified the effect of its evidentiary ruling concerning Rudy Quilon's specific bad acts, stating:

> And with the statements being he was a gang member in San Diego, that he killed a cell mate by pushing him down and, I believe strangling him, and that he had executed a lady because she was a snitch. The Court's ruling remains. I will also note that [Appellant] stated that the last statement to the effect allegedly made by the victim was days before the incident for the basis of the indictment that we are here

> for today. So based on the remoteness of time, as well as the prejudicial effect, the ruling stands.
>
> . . . .
>
> What I'm not going to allow you to bring forth to this jury is the fact that this victim alleged to be a gang victim in San Diego . . . . That he killed a cell mate by throwing him to the ground and strangling him. And that he had executed a young lady because she was a snitch . . . .

Tr. 116-18. Appellant had not witnessed of Rudy Quilon's specific bad acts. *McDonald v. State*, 538 So.2d 778, 780 (Miss. 1989). In order for Appellant to have introduced evidence of Rudy Quilon's specific past acts of violence, Appellant had either: witnessed these acts; or had personal knowledge of them. *Id.*

At the time, Appellant had no personal knowledge of Rudy Quilon. Appellant removed any application of this exception when Appellant proffered his testimony. When asked about Rudy Quilon's criminal history, Appellant admitted not knowing anything about Rudy's Quilon's past until the State's discovery. Tr. 109-10. Appellant knew only what Rudy Quilon told him on October 20, 2009. *Id.*

Even if Rudy Quilon told Appellant about specific bad acts in his past, the circuit court properly excluded statements concerning: gang affiliation; a cell-mate's murder; and, the murder of a "snitch." Appellant did not have direct or first-hand knowledge. These statements are second-hand. "Details of a prior difficult[ies] between [Rudy Quilon] and a third person prior to the homicide [are] inadmissible to show bad character of [Rudy Quilon]." *Russell v. State*, 607 So.2d 1107, 1116 (Miss. 1992) (affirming lower court's excluding as evidence, threats made by a prison inmate directed towards fellow inmates for purposes of showing defendant's state-of-mind for murdering a State corrections officer) (quoting *Shinall v. State*, 199 So.2d 251, 258 (Miss. 1967); *Walker v. State*, 140 105 So. 497 (Miss. 1925)).

The circuit court found Rudy Quilon's specific bad acts Appellant sought to introduce was character evidence, too remote in time and prejudicial as evidence tending to show Appellant feared and shot Rudy Quilon in self-defense. The circuit court's exclusionary ruling was proper, pursuant to Rules 404 and 405.

b. *Rudy Quilon's general propensity for violence was properly excluded.*

During the pretrial hearing on May 24, 2011, the State filed a Motion in Limine moving the circuit court to exclude Rudy Quilon's 1976 and 1985 convictions. Tr. 32-33. The State also moved ore *tenus* requesting the circuit court permit the State to redact the "and he's a prior felon" portion from the recorded 911 conversation. Tr. 33. Appellant claims the circuit court erred by allowing the "and he's a prior felon" portion of the 911 conversation to be redacted. He asserts that portion was relevant for the purpose of establishing his state-of-mind. Appellant argues the redaction was admissible hearsay as a present sense impression exception to the general rule against hearsay. Miss. R. Evid. 803(1). But without an overt act, it simply is not.

If there were a question as to whether Rudy Quilon or Appellant was the initial aggressor, Appellant would continue to bear the burden of introducing some factual basis of an overt act committed by Rudy Quilon. Miss. R. Evid. 404, cmt; *see Heidel v. State*, 587 So.2d 835, 844 (Miss. 1991) (citing Miss. R. Evid. 103(a)(2)); *see also Freeman v. State*, 204 So.2d 842 (Miss. 1967). The record shows no overt act committed on behalf of Rudy Quilon that would have placed Appellant in a reasonable state of apprehension or fear of imminent death or serious bodily harm. *Heidel*, 587 So.2d at 845-846 (citing Miss. R. Evid. 104(b), 404(a)). The circuit court soundly exercised its discretion by excluding this character evidence for violence subject to Appellant's "connecting . . . up" with some factual support of an overt act. *Id.*

Appellant's claim that the redacted portion of the 911 conversation is admissible under

Sanders is wrong. This Court in *Sanders* explicitly reviewed a Confrontation Clause matter. *See Sanders*, 77 So.3d 487-490. For Confrontation Clause purposes, Appellant's recorded "statement . . . [was] admissible as to him . . . ." *Smith v. State*, 986 So.2d 290, 301 (Miss. 2008) (citing *U.S. v. Ramos-Cardenas*, 524 F.3d 600, 609-10 (5th Cir. 2008); *U.S. v. Rodriguez-Duran*, 507 F.3d 749, 768-70 (1st Cir. 2007)). In *Sanders*, this Court adopted, then applied the combined objective evaluation established by the United States Supreme Court in *Michigan v. Bryant*. *Sanders*, 77 So.3d at 487-490 (citing *Michigan v. Bryant*, 131 S.Ct. 1143 (Miss. 2012)).

Bryant adds to the "primary purpose" approach for determining whether government interrogations involved questions asked primarily for the purpose of "enabl[ing] police assistance to meet an ongoing emergency . . . ." *Id.* (citing *Bryant*, 131 S.Ct. at 1166-67) Bryant refines this "primary purpose" analysis by requiring an objective evaluation of the circumstances. *Id.* at 488 (citing *Bryant*, 131 S.Ct. at 1165).

First, "determine whether the primary purpose of an interrogation is 'to enable police assistance to meet an ongoing emergency.'" *Id.* at 1156 (quoting *Davis*, 547 U.S. at 822). If the primary purposes of a government interrogation is to resolve an ongoing emergency, then consider: (a) when the interrogation took place (i.e., during an ongoing emergency); (b) the level of formality involved in the conversation (the government's line of questioning as well as the declarant's responses); and, (c) in medical emergencies, the condition of the victim at that time (this factor may provide insight into possible underlying motivations of the parties involved). *See Sanders*, 77 So.3d at 489-90.

When Biloxi first responders were dispatched, they knew little. Appellant provided the 911 dispatch officer with sufficient information, first responders knew: (1) the location of the situation; (2) Rudy Quilon was severely injured; (3) Appellant was armed or could arm himself quickly; and,

(4) at least two other individuals were close by. These questions "were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public." *Id.* at 490 ((citing *Bryant*, 131 S.Ct. at 1165-66). Rudy Quilon's medical condition was dire. He was alive, but bleeding profusely. Rudy Quilon spoke only to request water. The facts do not indicate any underlying motive.

Under *Sanders*, the 911 conversation was non-testimonial testimony. In light of the ongoing emergency, the parties' statements and conduct leave no doubt that the primary purpose of this conversation was the resolution of an ongoing emergency, and not for purposes of future prosecution. There was no Confrontation Clause violation.

Whether or not the redaction qualifies as an exception to the rule against hearsay does not legitimize Appellant's admissibility contention. *See* Miss. R. Evid. 404, cmt; *see Heidel*, 587 So.2d at 844-46 (citing Miss. R. Evid. 104(b)). The comment to Rule 803 of the Mississippi Rules Evidence states, "[t]he rule explicitly does not state that the exceptions therein are admissible." Miss. R. Evid. 803, cmt. Rule 403 is the "ultimate filter through which all otherwise admissible evidence must pass. *Jones v. State*, 920 So.2d 465, 475 (Miss. 2006).

The circuit court exercised sound discretion by excluding both Rudy Quilon's general character for violence and specific bad acts. Appellant had not offered some factual basis of an overt act to "connect-up" the general character evidence and specific bad acts evidence. *Heidel*, 587 So.2d at 845-46.

2. The prejudicial effect of Rudy Quilon's prior convictions and character for violence substantially outweighed its probative value.

The circuit court found the risk of undue prejudice substantially outweighed any probative value associated with Rudy Quilon's prior convictions. "[A] motion in limine 'should be granted

only where the circuit court finds [that]. . .(2) t he mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury.'" *McGilberry*, 797 So.2d at 942. Rule 403 is the "ultimate filter through which all otherwise admissible evidence must pass. *Jones*, 920 So.2d at 475. Rule 403 and its comment, state:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations undue delay, waste of time, or needless presentation of cumulative evidence.
>
> Relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. If the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence. By providing for the exclusion of evidence whose probativeness is outweighed by prejudice, Mississippi is following existing federal and state practice . . . . Such a rule also keeps collateral issues from being injected into the case . . . . This rule also gives the trial judge the discretion to exclude evidence which is merely cumulative.

Miss. R. Evid. 403 and cmt. (internal citations omitted). "The weighing and balancing task required by Rule 403 . . . asks only that a judge rely on his/her own sound judgment. *Jones*, 920 So.2d at 476. "The task of an appellate court in reviewing such a determination is not to conduct its own de novo Rule 403 balancing, but simply determine whether the circuit court abused its discretion in weighing the factors and in admitting or excluding the evidence." *Jones v. State,* 904 So.2d 149, 157 (Miss. 2005).

During the 911 conversation, Appellant stated, "he wants to sleep with my wife, and he's pushing off on me . . . . He thinks he's tough and all that . . . and he's a prior felon . . ." was a direct reference to Rudy Quilon's prior convictions. St.'s Ex. S-12. Given their age and in connection with the fact that Appellant had no actual knowledge of Rudy Quilon's convictions, the redacted portion was properly excluded. Appellant offered no factual bases of either "an actual threat or . . . a reasonable belief" to justify his use of deadly force. *Johnson v. State*, 29 So.3d 738, 746 (Miss.

2009). The circuit court found Rudy Quilon's prior convictions, irrelevant based on their remoteness in time.

Rudy Quilon's two prior convictions were decades-old during the five months he lived with Appellant. The age of the convictions significantly reduces the reasonableness a defendant's fearful state-of-mind. *Gates v. State*, 936 So.2d 335, 340 (Miss. 2006) (affirming the exclusion of character for violence based on a history of bad blood between the defendant and the victim, but no overt act warranted the defendant's actions.); *McGilberry*, 797 So.2d at 943 (finding past threats irrelevant to show reasonable apprehension). In other words, the tendency to show that Rudy Quilon's prior convictions placed Appellant in a state of apprehension or fear of imminent death is considerably diminished). *See* Miss. R. Evid. 403, cmt. (explaining that relevant evidence may be excluded where it "tend[s] to mislead, to confuse, or to prejudice the jury" or where its probative value is substantially outweighed by its prejudicial effect).

In light of the circumstances, the diminished probative value of "and he's a prior felon" adds nothing towards a resolution on whether Appellant acted in self-defense. The same cannot be said of its prejudicial effect on the jury. By Appellant's own account, the shooting was the result of Rudy Quilon's sexual comment.

Logically, the fact that Rudy Quilon was a prior felon does not coherently link to the chain of events leading to the shooting. Presenting a complete, coherent and rational narrative is paramount. *Flowers v. State*, 773 So.2d 309, 323-34 (Miss. 2000). The evening Rudy Quilon was shot, he returned to Appellant's home. He ate dinner, then joined Appellant on the porch. The two men were relaxing when Edith interrupted. Rudy Quilon made his sexual interest in Edith known. Edith left. Not long afterwards, Appellant left the porch, entered the house and proceeded to the master bedroom. He armed himself, and with Edith in tow, returned to the patio. Appellant found,

then shot Rudy Quilon in the backyard. In that context, "and he's a prior felony" does nothing more than detract and confuse. *Id.*; *see* Miss. R. Evid. 403, cmt. By removing the "and he's a prior felon" from the recording, the circuit court focused the jury's attention on the material issues at hand.

When weighed against the slight probative value, the evidence related to Rudy Quilon's prior convictions and character for violence was highly prejudicial. The combined effect of putting into to evidence Rudy Quilon's past bad acts greatly outweighs any tendency the same evidence has in proving self-defense. Appellant offered to introduce evidence that Rudy Quilon shot a female "snitch" execution-style; or, that Rudy Quilon murdered his cell-mate by manual strangulation. *Russell*, 607 So.2d at 1116 (affirming lower court's excluding as evidence, threats made by a prison inmate directed towards fellow inmates for purposes of showing defendant's state-of-mind for murdering a State corrections officer) (quoting *Shinall*, 199 So.2d at 258). Yet, Appellant had neither witnessed those acts or had first-hand knowledge of those specific past acts. *McDonald*, 538 So.2d at 780.

The circuit court properly granted the State's "motion in limine . . . based on its finding . . .[that]: (1) the material or evidence in question will be inadmissible at trial under the rules of evidence . . .[and] (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury." *McGilberry*, 797 So.2d at 942.

The State urges this Court to deny Appellant this claim for relief. The circuit court did not abuse its discretion by excluding evidence and testimony in reference to Rudy Quilon's prior convictions. In addition, Appellant suffered no Sixth Amendment right violation. The right to present an effective defense was available to Appellant. He simply never rang that bell. The State respectfully asks this Court affirm the circuit court.

II. WHETHER THE CIRCUIT COURT EXERCISED SOUND DISCRETION BY LIMITING THE CONTENT OF OPENING STATEMENTS TO WHAT THE PARTIES REASONABLY EXPECTED THE EVIDENCE WOULD SHOW.

Appellant asserts that the 911 telephone conversation and the written statement are in fact a single statement. App.'s Br. 63-64. Appellant cites no authority for this position, and is procedurally barred. "[A]ppellant's failure to cite relevant authority obviates the appellate court's obligation to review such issues." *Batiste v. State*, — So.3d —, 2013 WL 2097551, *40 (Miss. 2013); (quoting *Simmons*, 805 So.2d at 487). When reviewing claims of error with opening statements, this Courts asks "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Anderson v. State*, 62 So.3d 927, 939 (Miss. 2011).

A. Appellant did not and cannot show prejudice as a result of the circuit court's ruling, limiting Appellant's opening statement.

In his second claim of error, Appellant makes the assertion that the circuit court denied his right to open based on his reasonable expectation concerning what the evidence would show. App.'s Br. 62-63. He claims that the State put on the 911 conversation. In doing so, the circuit court permitted the State to present only part of the evidence. By limiting Appellant to the 911 conversation at opening, his right was denied. *Id.* Appellant argues that he should have been allowed to state at opening what he told the first-responding officer. *Id.* Appellant argues that the statement is in writing, and was evidence that he should have been allowed to present. *Id.*

At opening, the State told the jury that it anticipated the evidence would show, partly through Appellant's statements made to a 911 dispatcher, that Appellant murdered Rudy Quilon. Tr. 224-26. Following the State's opening statement, Appellant told the jury that a written statement taken by a responding officer, when read aloud, would prove Appellant acted in self-defense. Tr. 229. This

statement, according to Appellant, was actually a smooth "transition from the 911 to the police officers . . . ." *Id.* at 233.

The State objected to Appellant's assertion and stated specifically, "this [law enforcement officer] is not going to be here to say he said anything." Tr. 230. The circuit court sustained the objection; and explained to Appellant, "[y]ou can limit your opening statement to what you anticipate the evidence is going to show." *Id.* "And I think you know full well of the ramifications of you placing the statement to the jury . . . ." *Id.* at 230-31.

"Attorneys are afforded wide latitude in arguing their cases to the jury, but they are not allowed to employ tactics which are. . . reasonably calculated to unduly influence the jury.'" *Galloway v. State,* — So.3d —, 2013 WL 2436653, *19 (Miss. 2013) (quoting *Sheppard v. State*, 777 So.2d 659, 661 (Miss. 2000)). That said, Appellant's "opening statement shall be confined to a statement of the defense and the facts that defendant expects to prove in support thereof." U.R.C.C.C. R. 10.03. (emphasis added). The written statement was not offered as evidence by the State. Similarly, Officer Roberts was not subpoenaed by the State to testify. But more importantly, Appellant admitted he had not disclosed a single witness as the circuit court ordered. Tr. 50. Appellant explained to the circuit court the rationale underlying Appellant's failure to disclose any evidence or witnesses. *Id.* Appellant stated:

> Appellant: Now, there's no requirement in there that we do so in your order, at least, and to do so in writing, but we did disclose, to a certain extent, what we saw at the time. We disclosed in writing what we were anticipating.
>
> Court: Just as a matter of record, let me clarify that my order states it's so ordered that any and all prospective witnesses and the expected substance of their testimony shall . . . be fully disclosed no later than April 25th, 2011.
>
> Appellant: And, of course, there is no reference to say it's in writing or

> how, writing or how, but we disclosed it. I want to make sure the order is clear.

Tr. 50. Appellant cannot force the State to put on evidence as he sees fit. *Hickson v. State*, 512 So.2d 1, 3 (Miss. 1987) (stating "[n]either the appellant, nor the court, instructs the State, or any other party to litigation, what witnesses that party shall put on the stand or how that party shall present its case.") Appellant, "'cannot . . . state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence" *Galloway*, WL 2436653, *19; (quoting *Sheppard*, 777 So.2d at 661). "Neither can he appeal to the prejudices of men by injecting prejudices not contained in some source of the evidence.'" *Id.* at *19.

Appellant must show how this limitation at opening effected any of his substantial rights. After all, if he reasonably expected the evidence would show the officer's statement, the question becomes why was it not offered. The circuit court did not deny Appellant the right to present an effective defense. Appellant chose not to offer any evidence before the court. *See Morris v. State*, 843 So.2d 676, 678 (Miss. 2003) (holding that "an appellant must show actual harm or prejudice before this Court will reverse a circuit court's limitation . . . ."). His failure is not the fault of the court. Appellant has not shown the circuit court prevented him from offering the officer's written statement into evidence.

This assignment of error is procedurally barred. Substantively, Appellant failed to and cannot show from this record that had Appellant discussed his potential self-defense during opening statements that the outcome of trial would have been different. This claim lacks merit.

III. WHETHER JUDICIAL BIAS AND PROSECUTORIAL MISCONDUCT HAD A CUMULATIVE, ADVERSE EFFECT ON APPELLANT'S RIGHT TO A FAIR TRIAL.

No. Appellant claims to have suffered the cumulative effect of judicial bias and prosecutorial

misconduct. He argues the circuit court showed a biased position by sustaining "virtually every objection" made by prosecutors. App.'s Br. 69-70. Yet, Appellant does not offer any alternative that would explain why these objections should have been overruled.

A. Notice of the Gunshot Residue Reports was Proper Pursuant to Rule 9.04.

In the his of sub-issue, Appellant contends that the State failed to give proper notice of the results of three gunshot residue tests. App.'s Br. 16-17. Appellant does not specifically cite relevant authority for this position. In turn, Appellant is procedurally barred. *Gowdy v. State*, 56 So.3d 540, 543 (Miss. 2010) (citing *Archer v. State*, 986 So.2d 951, 955 (Miss. 2008)); *see Batiste*, 2013 WL 2097551, *40.

The rule governing this type of discovery issue is Rule 9.04 of the Uniform Rules of Circuit and Chancery Court Practice. Subsection "E." of Rule 9.04 provides that:

> Both the state and the defendant have a duty to timely supplement discovery. If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall promptly notify the other party or the other party's attorney of the existence of such additional material, and if the additional material or information is discovered during trial . . . .

U.R.C.C.C. R. 9.04. The record clearly shows the State upheld its duty to supplement discovery, found at U.R.C.C.C. R. 9.04 by disclosing the findings of the GSR tests when they became available. The following exchange occurred during a March 21, 2011 pre-trial motion hearing:

> Appellant: [I]f I heard [the State] correctly, this may explain why I wasn't able to get the actual results of a gunshot residue because I think they came in later. If I could make one point of inquiry right now, when did they become available?
>
> State: *The day I received it is the day I mailed it or faxed it.*
>
> Appellant: Which is the date, I was asking if we know that date, but roughly a month. It was not that long ago. The exact date may become

important in a minute. But I got them very late.

Court: I would like to know . . . it is probably prime importance.

State: *Faxed to both counsel opposites on February 17th, along with our motion in limine*.

Appellant: February the 17th of this year?

State: Uh-huh.

Appellant: Now, since February 17th, as I stated, Your Honor, I have been extremely involved in other matters. But my – when these were faxed to us, they were apparently attached to a number of other motions, many motions, which is that these reports had nothing to do with the motions. I think it's just a matter of course that they got something and sent it to us. So my attention, actually, was not called to these reports. Gunshot residue had nothing, really, to do with my defense of self defense. We weren't – it was irrelevant as far as I was concerned. So my attention really wasn't called to that.

Tr. 13-14 (emphasis added). Speaking to this "newly discovered" evidence, the circuit court explained:

> I find many issues troubling . . . [but] the least of which is the timeliness of the motions that are filed. I understand when we refer to newly discovered evidence, in the court's experience, that is in and of itself newly discovered evidence. But I guess what I'm hearing is that this isn't newly discovered evidence, this is evidence that was disclosed February the 17th, 2011. So it may have been newly discovered in that that's the first time, I guess, within the past few weeks that defense counsel looked through the discovery and saw it. I guess, in that respect, it would be newly discovered, but it's not as if this evidence was not disclosed. And frankly, I'm not sure if I see that as a basis for a continuance. The fact that it was disclosed and by . . . two seasoned attorneys, no one saw it or no one, for what ever reason, didn't look at it, whether they thought the defense was going in a different direction or not, I . . . am not convinced . . . that is the basis for a continuance of a trial.
>
> . . . .
>
> [F]or all we know . . . [Appellant's counsel] was fully aware of all of these issues on February the 17th, 2011. I don't know if we're speaking of justice, why it has to enure to the detriment of the State of Mississippi that two attorneys didn't see GSR evidence that was disclosed February th 17th, 2011. I fail to see how that could be considered newly discovered evidence when it is not newly discovered evidence . . . .

Tr. 21-22.

Based upon the record excerpt above, Appellant had the results of the gun shot residue available as of February 17, 2011. For reasons unknown, Appellant's counsel either chose not to pursue a defense which implemented that evidence; or, abandoned that defense, altogether. Yet, that fact does not constitute judicial bias or prosecutorial conduct. To the contrary.

The State followed the rules governing its duty to supplement discovery. Further, Appellant has yet to explain how judicial bias and / or prosecutorial misconduct affected Appellant's ability to present such a defense, particularly when Appellant had the information necessary to do so. *Ford*, 975 So.2d at 868-69 (stating that "[w]ithout further explanation or citation to law, there can be no finding of error or judicial bias to warrant reversal."). This assignment of error is procedurally barred, and lacks substantive merit.

B. The circuit court exercised sound discretion in denying Appellant's motion for a continuance based on a claim that Appellant could not hear; and, was unable to communicate with trial counsel

In sub-issue two, Appellant claims the circuit court denied him of his right to fair trial by denying a motion for continuance for the purpose of replacing and / or repairing Appellant's damaged hearing aids. App.'s Br. 17-28. Appellant claims to have been unable to communicate with his trial counsel. App.'s Br. 17. Instead of granting a continuance, the circuit court provided Appellant with headphones that supplied amplified audio relay during Appellant's trial. Appellant argues that the headphones were adjusted in such a way as to prevent him from adjusting the volume of his voice.

"The decision to grant or deny a motion for continuance is within the circuit court's sound discretion." *Harden v. State*, 59 So.3d 594, 601 (Miss. 2011) (citing *Payton v. State*, 897 So.2d 921, 931 (Miss. 2003)). "It 'will not be grounds for reversal unless shown to have resulted in manifest injustice.'" *Id.* (quoting *Payton*, 59 So.2d at 931).

Here again, Appellant does not specifically cite relevant authority for this position; and, is now

procedurally barred. *Gowdy*, 56 So.3d at 543 (citing *Archer*, 986 So.2d at 955); *see Batiste*, 2013 WL 2097551, *40. Further, Appellant cites several excerpts in his brief on direct appeal that occurred prior to his raising the issue before the circuit court. Appellant did not contemporaneously object, specifically to the fact that Appellant was unable to hear communications. "If no contemporaneous objection is made, the error, if any, is waived." *Batiste*, 2013 WL 2097551, *12.

Appellant decided to call attention to the fact that his hearing aids were not functioning appropriately literally minutes prior to trial. Tr. 120. The record shows that Appellant was quite aware of this problem, at least days before:

> Court: Are we ready to bring in the jury?
>
> Appellant: No, sir . . . [w]e've been dealing with [an issue] for a few days and did not understand the magnitude of the problem until this morning. May I go forward with that?
>
> Court: Yes, sir.
>
> Appellant: [O]ver the last few days, [Appellant's counsel] [has] been having trouble communicating with [Appellant] . . . . [Appellant's counsel] [has] been having trouble doing this. We just wrote it up to believing that the stress of the situation and being confronted with the magnitude of what we're here for was causing - - would cause [Appellant] and a lot of people trouble communicating . . . .

Tr. 204-05 (emphasis added).

Appellant claims that the circuit court "made several additional erroneous observations . . ." and cites several portions of the record in support. App.'s Br. 19-27. In fact, the circuit court was actually making a record of its finding for not granting a continuance. *Id.* The circuit court's findings support its decision to provide Appellant audio assistance via the headphones as a "reasonable alternative." *See Shook v. State*, 552 So.2d 841, 844-45 (Miss. 1989) (affirming lower court's decision to not grant a deaf defendant a continuance for purposes of learning sign language to

communicate during trial with trial counsel).

Just as in *Shook*, Appellant did not show good cause for granting the continuance, specifically where the circuit court's findings of fact on the record indicate that Appellant was not only capable of hearing, but also communicating with his trial counsel. *Id.* at 845 ("A trial should not be postponed . . . if any reasonable alternative exists."). Appellant was not illiterate or unable to speak. *See Id.* Instead, the "record shows, beyond doubt, that the trial judge reasonably concluded that [Appellant] could communicate with those around him sufficiently to permit him to function in a reasonably normal fashion." *Id.* This is particularly relevant given the fact that Appellant's trial was rescheduled on four separate occasions. Tr. 125. This issue is without merit.

C. The circuit court did not exhibit judicial bias by asking a testifying witness to repeat his immediate response to a question presented by the State.

In his third claim or error, Appellant asserts that the circuit court's judicial bias was clearly demonstrated through "[t]he sting and undue attention of the alcohol allegation . . ." presented by the State. App.'s Br. 28. The State asked Biloxi Police Department Investigator, Michael Brown about whether Officer Brown detected the smell of alcohol after coming into direct contact with Appellant's person on October 20, 2009. Tr. 267. That exchange appears below.

Court: Are we ready to bring in the jury?

State: During the course of your investigation, did you have some contact with [Appellant] that night?

Inv. Brown: Yes, sir.

State: Did he smell of alcohol?

Inv. Brown: I did smell alcohol on him.

Court: Hold on one second. I didn't understand what you said. Repeat your answer.

Inv. Brown: Yes, sir, he did smell of alcohol.

Tr. 267. Procedurally, the issue is barred from this Court's review. On page twenty-eight (28) of Appellant's brief at footnote eleven (11), Appellant readily admits his failure to contemporaneously object to this line of questioning. That failure bars this sub-issue from this Court's review. *See Batiste*, 2013 WL 2097551, *12 (stating that "[i]f no contemporaneous objection is made, the error, if any, is waived."). Review of this matter is also barred by Appellant's failure to cite relevant authority for this proposition. *See Gowdy*, 56 So.3d at 543 (citing *Arche*r, 986 So.2d at 955); *Batiste*, 2013 WL 2097551, *40.

Substantively, this sub-issue lacks merit. "The great danger, particularly in a criminal case, is that the weight and dignity of the court accompany each question or comment, although not so intended by the judge." *Id.* at 691; (citing *McKinney v. State*, 26 So.3d 1065, 1071-72 (Miss. Ct. App. 2009) (quoting *Thompson v. State*, 468 So.2d 852, 854 (Miss.1985)). There is no doubt that "[j]urors are most susceptible to the influence of the judge; [and], he cannot be too careful and guarded in his language and in his conduct in the presence of the jury." *Shephard*, 66 So.3d 687, 692 (Miss. Ct. App. 2011) (quoting *Beyersdoffer v. State*, 520 So.2d 1364, 1366 (Miss. 1988)).

But, the circuit court's request to repeat a single response did not adversely affect the outcome of Appellant's trial. That point is bolstered by Appellant's failure to: (1) contemporaneously object; and, (2) to show some sufferance of prejudice, here on appeal. *Ford*, 975 So.2d at 868-69 (stating that "[w]ithout further explanation or citation to law, there can be no finding of error or judicial bias to warrant reversal."). This assignment of error is procedurally barred, and lacks substantive merit.

D. Appellant suffered not suffered prejudice due to the any judicial bias or prosecutorial misconduct, let alone its cumulative effect.

In his fourth and final claim of error, Appellant contends that the cumulative effect of both

prosecutorial misconduct and judicial bias had an adverse effect on the outcome of his trial. The discussion below follows the progression of Appellant's brief. Appellant contends judicial bias stemmed from the circuit court's prior prosecutorial occupation. This issue was not raised to the circuit court's attention. *See Sumrerll v. State*, 972 So.2d 572, 575 (Miss. 2008). Appellant's claims of judicial bias are procedurally, barred. *Id.*

1. The State did not elicit false testimony from Investigator Brown.

In the first of four parts of this fourth sub-issue, Appellant claims that the State called Investigator Michael Brown of the Biloxi Police Department to the stand for the purpose of giving false testimony. Specifically, Appellant asserts that Investigator Brown was the lead investigator assigned to the crime scene at Appellant's residence. App.'s Br. 29. Because Officer Brown gave false testimony by denying his role as lead investigator at the scene, Appellant was unable to offer pictures on Rudy Quilon's cell phone; and, the results from the gun shot residue tests of Appellant, Appellant's wife and Appellant's brother-in-law. *Id.* at 30.

Appellant cites the following passage in his brief as support for the assertion that Investigator Brown was the lead investigator on the night of October 20, 2009.

State: Would you explain what you – in what capacity you serve the City of Biloxi?

Inv. Brown: I'm an investigator in the violent crimes division.

State: An you are called, on occasion, to assist in homicide investigations, correct?

Inv. Brown: Yes, sir.

State: In this particular case, you are not the lead investigator, but you did participate, correct?

Inv. Brown: Yes, sir.

App.'s Br. 30; see also Tr. 262. However, the passage continues and removes any confusion as to Investigator Brown's testimony.

> State: Let me draw your attention back to the evening that this happened, October 20th of 2009. Were you working that evening?
>
> Inv. Brown: I was actually at home and I was on call, the on-call investigator. So I was called out.

Tr. 262. The record proves the rationale underlying Investigator Brown's testimony. Investigator Brown was not the lead investigator, because Investigator Brown was not on duty. Tr. 262. Investigator Brown was called onto the scene. *Id.* Investigator Brown was one investigator, who helped with the October 20, 2009 investigation. *Id.* However, Investigator Brown's title and assistance provided does not change the fact that another Investigator was assigned the lead investigator that night. *See Id.* at 308. This matter is substantively without merit.

2. The State did not disregard the State's evidentiary rules; or, ignore the objections made by Appellant and sustained by the circuit court during the State's direct examination of Investigators Brown and Britt.

This issue is procedurally barred. "[A]ppellant's failure to cite relevant authority obviates the appellate court's obligation to review such issues." *Batiste*, 2013 WL 2097551, *40 (quoting *Simmons*, 805 So.2d at 487).

Appellant contends that the circuit court permitted a line of questioning relating to GSR reports and bullet trajectory , which the State present. Appellant argues that he was denied the opportunity to present a similar line of questioning. This Court reviews the circuit court's decision to exclude evidence for abuse of discretion. *Brown v. State*, 890 So.2d 901, 915 (Miss. 2004) (citing *Harris v. State*, 731 So.2d 1125, 1130 (Miss. 1999)); *see* Miss. R. Evid. 701.

Appellant compares the State's re-direct examination of Investigator Brown with Appellant's

cross-examination of Investigator Britt. App.'s Br. 35-44. As it concerns the State's re-direct examination of Investigator Brown, Appellant claims that the State ignored sustained objections related to the GSR reports of Appellant and Edith Richardson. "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Miss. R. Evid. 701.

In his brief, Appellant cites the record where the State asks Investigator Brown if receiving the results of a GSR reports would end his investigation. App.'s Br. 37. Investigator Brown answered in the negative. The State's question required Investigator Brown to draw upon his own experiences as an investigator, not as an expert. This Court has stated "[t]he comment to Miss. R. Evid. 701 explains that the old traditional rule was to exclude lay opinions from evidence. *McGowen v. State*, 859 So.2d 320, 345 (Miss. 2003) (citing Miss. R. Evid. 701 cmt.). By contrast the comment to the rule explains that "lay opinions, such as Investigator Brown's testimony, is admissible provided two considerations are met." *Id.* The point of the State's examination of Investigator Brown is important to note.

The State's line of questioning, which Appellant takes issue with, was presented on redirect examination of Investigator Brown. '" Rule 701 does not open the door to any and all opinion testimony.'" *Id.* (quoting *Jackson v. State*, 551 So.2d 132, 144-45 (Miss. 1989)). However, this Court has held that Rule 701 does open the door for specific knowledge and / or opinion to be introduced on redirect examination. *Id.* (citing *Jackson*, 859 So.2d at 144-45 (concluding the introduction of such testimony on redirect examination cannot "sensibly" be construed in such a way as to find violate a defendant's right to a fair trial)).

The comment to Rule 701 provides two considerations to be satisfied before lay opinion may be admitted into evidence. "The first consideration is the familiar requirement of first-hand knowledge or observation." Miss. R. Evid. 701 cmt. "The second consideration is that the witness's opinion must be helpful in resolving the issues." *Id.* "Rule 701 . . . provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion." Id. The record shows Rule 701's two considerations were met.

The State asked Investigator Brown, on redirect, whether "a positive gunshot residue result would . . . end [Investigator Brown's] investigation?" Tr. 309. If a witness's testimony includes opinion, ask whether "the opinion is based on first hand knowledge or observation?" *Id.* The State's asked Investigator Brown to draw upon his experience as a police investigator; and, to state whether a murder investigation would end once the results of a GSR test were reported. Investigator Brown responded, "[n]o, sir." *Id.* Investigator Brown's testimony satisfied the first consideration provided by the comment to Rule 701. *See* Miss. R. Evid. 701 cmt.

Investigator Brown's testimony was based on first-hand knowledge and first-hand observation. Investigator Brown was an Investigator in the Violent Crimes Division of Biloxi's Police Department. Tr. 262. Further, Investigator Brown prepared Appellant's GSR sample. Tr. 268. Investigator Brown's response to the State's question, though extremely abbreviated, was clarifying.

The second Rule 701 determination is "whether the opinion [wa]s helpful to the issue being determined." *McGowen*, 859 So.2d at 344 (citing Miss. R. Evid. 701 cmt.). Investigator Brown, an investigator of violent crimes, told the jury that a murder investigation does not stop once results of a Gun Shot Residue sampling is returned. This was pertinent to resolving any potential juror confusion surrounding this type of forensic evidence gathering. While the GSR reports were probative and relevant, they were not absolutely conclusive. The entire investigation did not turn on

the results of a GSR investigation.

Appellant asked Investigator Brown whether Edith Richardson was a suspect for the death of Rudy Quilon at the time her gunshot residue sample was taken. Tr. 275. Investigator Brown stated Edith Richardson was not a suspect. Id. Investigator Brown explained that Appellant "had earlier admitted to shooting and killing [Rudy Quilon] on the phone." *Id.* Investigator Brown's testimony was pertinent for resolving possible juror confusion. Rule 701's second consideration was met.

In his brief, Appellant claims those questions presented to Investigator Britt were essentially the same as the question presented to Investigator Brown, discussed above. App.'s Br. 37-44. Appellant argues the State improperly objected to questions concerning Rudy Quilon's autopsy. *Id.* As a result, the circuit court to became confused. *Id.* That confusion caused the circuit court to sustain the improper objections; and in turn, prevented Appellant from developing testimony given by Investigator Britt concerning Rudy Quilon's wound and stippling around that wound. *Id.*

Appellant specifically asked Investigator Britt to describe the angle of trajectory the bullet that struck and fatally injured Rudy Quilon took. *Id.* at 43. Yet, Investigator Britt made it quite clear he was present for purposes of collecting evidence via photograph. Investigator Britt stated that, "[a]s a crime scene investigator, [he was] responsible for identifying, documenting, and collecting evidence as it applie[d] to a particular case." Tr. 356-57. Rule 701(c) does not apply to testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *See* Miss. R. Evid 701(c).

Investigator Britt observed and had first-hand knowledge of documenting and collecting the evidence via photograph or otherwise during Rudy Quilon's autopsy. Certainly Investigator Britt observed the autopsy. Tr. 370; 384-86; But, Rule 701 applies to the admission of lay opinions, not expert opinions. *See Brown*, 890 So.2d at 915-16 (explaining that opinions or perceptions such as

a vehicle's speed; the location of a file on a computer desktop; or, whether a person appeared to be intoxicated were admissible under 701) (citing *Moore v. State*, 816 So.2d 1022, 1028 (Miss. Ct. App. 2002); *Boone v. State*, 811 So.2d 402, 405-06 (Miss. Ct. App. 2001); *Harvard v. State*, 800 So.2d 1193, 1196-97 (Miss. Ct. App. 2001).

In this case, Appellant's question concerning the angle of trajectory a bullet that fatally wounded Rudy Quilon was beyond Investigator Britt's first-hand knowledge and observation. Appellant's line questioning would be accurately characterized as scientific, technical or specialized. *See Jones v. State*, 678 So.2d 707, 710 (Miss. 1996) (finding a child care employee's testimony speculative and based on second-hand knowledge where the employee opined the victim's death was the result of cocaine ingestion). The State properly and contemporaneously objected. And, the circuit court properly sustained that objection.

The State's line of questioning fell squarely within the scope of Rule 701. Investigator Brown gave first-hand knowledge of a task he routinely conducted. Further, Investigator Brown's response simply clarified juror confusion that the results of gunshot residue sampling were not outcome determinative in a murder investigation. The circuit court did not abuse its discretion by allowing the State's questioning, nor was the circuit court was confused by the State's objections to Appellant questions. Appellant's questions were quite distinguishable from the State's.

The circuit court and the State acted within the scope of the Mississippi Rules of Evidence. There was no error. Even if the circuit court and State had erred and the cumulative effect of those errors had adversely affected a substantial right of Appellant, the result should be the same. Appellant has not shown how the cumulative effects of judicial bias and prosecutorial misconduct caused him to suffer undue prejudice. *See Ford*, 975 So.2d at 868. This issue is without merit.

3. The State's closing argument were based on facts in evidence and the reasonable

inferences and deductions drawn therefrom.

Thirdly, Appellant claims the State "falsely stated to the jury that two detectives stated that the GSR evidence did not mean that Mr. Richardson did not fire the weapon, in direct violation of the [t]rial [j]udge's ruling." App.'s Br. 46 (internal quotations omitted). When reviewing claims of prosecutorial misconduct concerning improper comments made during closing arguments, this Court asks "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Anderson*, 62 So.3d at 939 (quoting *Tate v. State*, 20 So.3d 623, 629 (Miss. 2009)).

Earlier it was stated "[a]ttorneys are afforded wide latitude in arguing their cases to the jury, but they are not allowed to employ tactics which are. . . reasonably calculated to unduly influence the jury'" was cited in this brief as it concerned opening statements. Resp's Br. 25 (citing *Galloway*, WL 2436653, *19; see also *Anderson*, 62 So.3d at 939; *Tate*, 20 So.3d at 629). This rule applies to opening and closing arguments.

Under this Court's precedent, the State was allowed to comment "upon any facts introduced into evidence, and [was allowed to] draw whatever deductions and inferences that seem[ed] proper to [the State] from the facts." *Galloway*, WL 2436653, *19 (quoting *Bell v. State*, 725 So.2d 836, 851 (Miss. 1998)). The State was not allowed to incorporate "tactics which [were] inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." *Id.* at * 19 (quoting *Sheppard*, 777 So.2d 659, 661 (Miss 2000)). The record shows that the State did not argue points which were either not introduced into evidence or deduced or inferred from evidence properly admitted at trial.

First, Appellant asserts the State improperly told the jury that "'two detectives stated that the GSR evidence did not mean that [Appellant] did not fire the weapon . . . .'" App.'s Br. 46. Appellant goes on to cite page 475 of the trial transcript. *Id.* The following passage reflects exactly what the

State stated during closing arguments. At closing, the State argued:

> You don't have gunshot residue results in evidence. And you certainly don't have anyone saying that if there is gunshot residue on someone's hands they even fired the gun. You have two state's witnesses saying it's just a test to see if they were around the weapon one way or the other . . . .

Tr. 475. The State's argument disclosed the fact that no gunshot residue was ever admitted at trial. The State warned the jury not to be confused by gunshot evidence residue. Tr. 476. That's certainly a reasonable deduction, given the testimonies of Officers' Brown and Britt.

Next, Appellant contends that the State improperly commented on the fact that Appellant offered Rudy Quilon a place to stay. App.'s Br. 47-48. Appellant argues that the circuit court attempted to stop the State from arguing that members of Rudy Quilon's family were present throughout trial. *Id.* at 48. The record shows that the circuit court gave no indication of granting Appellant's objection to this portion of the State's closing statement. Tr. 475; *see* App.'s Br. 48. Further, Appellant claims that the State's statement concerning Rudy Quilon's family members was improper as an "expression of facts not in evidence . . . [and as] . . . a plea for a verdict based upon sympathy . . . ." *Id.*

Appellant points to the fact that Rudy Quilon was invited into Appellant's home, because Rudy Quilon's family refused to do so; and, that this fact was introduced into evidence. *Id.* at 47-48. "'[A]ny allegedly improper prosecutorial comments must be considered in context, considering the circumstances of the case, when deciding on their propriety.'" *Batiste*, 2013 WL 2097551, at *12. The State's statements made at closing are restricted to arguments based on "facts introduced in evidence [as well as] deductions and conclusions that may be reasonably draw[n] therefrom, and application of law to facts." *McGilberry*, 741 So.2d at 910 (quoting *Holland v. State*, 705 So.2d 307, 343 (Miss. 1997)).

The State's statement was made in connection with Appellant's arguments which were offered in his attempts to show Appellant's good character and Appellant's regret for Rudy Quilon's death. Tr. 476. Just as Appellant argued his regret to the jury, the State responded by stating Rudy Quilon's family member's regret as well. In turn, the State was allowed to make its argument to the jury on this point by way of reasonable inferences and deductions. *McGilberry*, 741 So.2d at 910 (quoting *Holland*, 705 So.2d at 343).

Finally, Appellant asserts the State's statements made at closing, concerning Edith Richardson's testimony and written statement amounted to prosecutorial conduct. App.'s Br. 49. The State provided Investigator Brown with a written transcript of Edith Richardson's statement given to Investigator Brown on October 20, 2009 for purposes of refreshing Investigator Brown's recollection. Tr. 265-66. At this point, the written statement and an audio recording of that statement were marked for purposes of identification. *Id.*

Investigator Brown's testimony was entered into evidence at trial. As Appellant recognizes, the circuit court permitted the State to impeach Edith Richardson with the statement she gave to Investigator Brown. The record shows the State's statements concerning Edith Richardson's statements, made during closing arguments, were based on the "facts introduced in evidence" at trial. *Batiste*, 2013 WL 2097551, at *12.

In addition, Appellant has not shown that prejudice resulted as a natural and probable cause of the State's statements made at closing. *Id.* at 911 (quoting *Rushing v. State*, 711 So.2d 450, 455 (Miss. 1998)). Appellant has not and cannot show the State's statements adversely influenced the jury's decision, causing Appellant to suffer prejudice. *Id.* The State's case presented to the jury during closing arguments were based upon fact entered into evidence, and reasonable deductions and inferences therefrom. This assignment of error lacks merit.

4. Whether the circuit court abused its discretion by denying Appellant's numerous motions for mistrial.

Appellant finally claims relief is warranted, if not for the preceding individual errors, then he has suffered prejudice from the errors' cumulative effect. App.'s Br. 71. The State disagrees. First, there were no individual errors. Even if there were, their cumulative, combined effect would not warrant overturning a jury verdict and awarding a new trial. "[J]udicial rulings alone almost never constitute a valid basis for bias or partiality . . . [u]nless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling." *Mingo v. State*, 944 So.2d 18, 31 (Miss. 2006) (emphasis added) (quoting *Farmer v. State*, 770 So.2d 953, 958 (Miss. 2000).

In his brief, Appellant cites the capital murder case of *Ross v. State*, which provides factors to consider when the "cumulative-error" doctrine is raised. *Ross*, 954 So.2d 968, 1018 (Miss. 2007). Those factors include, "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged . . . ." are relevant factors to consider. App.'s Brief 71 (quoting *Ross*, 954 So.2d at 1018).

The factors to be considered when determining whether cumulative error warrants reversal unequivocally show this claim is without merit. In this case, one of murder and life imprisonment, the gravity of the crime is undeniably serious. Appellant certainly has a serious interest in his personal liberties. Yet, the State has an equally serious interest in seeking justice. *Flowers*, 773 So.2d at 323-34.

The quantity and character of error, if any, is minute. "[J]udicial rulings alone almost never constitute a valid basis for bias or partiality . . . ." *Mingo*, 944 So.2d at 31. For example, the State contends that denying a continuance that was raised so that batteries for a hearing aids might be obtained was not error. But even if it were error, Appellant failed to show he was unable to

communicate. On top of that, Appellant spoke throughout the proceedings. Trial was reset five times prior to this continuance. There were no facts that Appellant was unable to communicate effectively.

The final factor weighs guilt against innocence. In this case, a gulf of evidence separated the State from Appellant. Appellant admitted to shooting Rudy Quilon when he called 911. Edith Richardson corroborated that act; and provided a highly descriptive events of that night. Whereas, Appellant sought to introduce evidence of highly prejudicial statements, he admitted to have no personal knowledge of. Appellant did not disclose a single witness or come forward with evidence of an overt act. On the one hand, the State introduced an admission of guilt for murder, corroborated by a recorded statement versus nothing on the other hand. This was not a close case.

The State urges this Court deny Appellant's claim. His assertions that numerous judicial rulings, which were not favorable to him, does not warrant granting relief. *Mingo*, 944 So.2d at 31. Additionally, the cumulative error doctrine's factors show overwhelming evidence against Appellant, particularly in light of the lack of error and the prejudicial potential of the claims of error.

Finally, Appellant has not shown with proof of judicial bias or prosecutorial misconduct in an individual circumstance had a prejudicial effect, let alone a cumulative effect. Appellant's claim is without merit.

IV. WHETHER THE CIRCUIT COURT ERRED ON THE ISSUE OF POST-TRAUMATIC STRESS SYNDROME AS BASIS FOR A DEFENSE OF IMPERFECT SELF-DEFENSE WHERE APPELLANT NEVER RAISED THE ISSUE BEFORE THE COURT.

No. In his final claim of error, Appellant asks this Court to find Appellant was denied the ability to develop a theory of self-defense predicated on Appellant's post-traumatic stress disorder diagnosis. App.'s Br. 54. Such a finding warrants reversal of Appellant's verdict; or alternatively, permit Appellant to fully develop this defense at retrial. *Id.* In support, Appellant cites this Court

decision in *Evans v. State*, 109 So.3d 1044 (Miss. 2013).

Appellant abandoned this imperfect self-defense theory prior to trial. Appellant voluntarily decided against developing this theory; and, informed the circuit court this defense was being abandoned. *See Gillett v. State*, 56 So.3d 469, 520-21 (Miss. 2010) (quoting *Williams v. State*, 684 So.2d 1179, 1203 (Miss. 1996)). The circuit court did not err, because this issue was never presented to the circuit court. *Glasper v. State*, 941 So.2d 708, 721 (Miss. 2005) (stating that a party's failure to raise an issue at trial waives review of that issue on appeal) (citing *Smith v. State*, 729 So.2d 1191, 1201 (Miss. 1998)). Appellant is now procedurally barred from raising it on direct appeal. Substantively, this claim's lack of merit warrants denial of the relief Appellant seeks. Appellant relies solely on *Evans v. State* as the legal basis of his argument. 109 So.3d 1044 (Miss. 2013).

In *Evans*, this Court reversed both the circuit court and the Court of Appeals' judgments and remanded after finding a evidentiary basis, sufficiently supporting: an actual need for expert assistance for purposes of developing an imperfect self-defense, based on the defendant's PTSD diagnosis; and, the circuit court's denial of expert assistance funding was in violation of the indigent defendant's right to due-process. *Id.* at 1049-1050. Neither of those points in Evans applies to this claim.

A. Appellant has not shown actual need.

In *Evans*, this Court found the circuit court's decision to deny an indigent defendant the funds necessary for obtaining expert assistance adversely effected the defendant's due process rights right. *Id.* at 1048. That ruling was based on facts contained in the record which demonstrated the defendant's need for expert assistance. *Id.* at 1049. This Court agreed with the defendant's position that expert assistance was key to presenting clear and accurate testimony to the jury. In support of his position, the defendant provided expert testimony, who explained that PSTD was beyond the

scope of her expertise. That expert clearly expressed the need for an expert in PSTD as essentially to informing the jury concerning PTSD's symptoms, characteristics and psychological effects. *Id.*

In the present case, Appellant's claim stands in stark contrast to the defendant's in Evans. Appellant abandoned this defense prior to trial. Unlike the defendant in Evans who offered fact-based evidentiary support for his claim. The are no such facts in this record. This factual void did not go unnoticed by the circuit court, who found "nothing . . . referring to, or even inferring any relationship to post-traumatic stress disorder." Tr. 48. In fact, Appellant proffered assertions related to this issue, pre-trial and post-trial. During a pre-trial motion hearing, Appellant proffered an assertion that three physicians treated Appellant for PTSD. Tr. 203. In building on that assertion, Appellant claimed he possessed at least two compact discs filled with medical records corroborating his PTSD diagnosis. Yet, Appellant did not name one of the three treating physicians or provide a single medical record those physicians provided Appellant. *Id.*

Based on the scope of this Court's review, Appellant did not and cannot demonstrate any error , based on the facts in the record. *See Pauley v. State*, 113 So.3d 557, 561-62 (Miss. 2013) (stating this Court's review is limited to the record).

B. The circuit court did not enter a decision which had an adverse effect on a substantial right of Appellant.

The circuit court in *Evans* entered a decision denying the funds necessary to the defendant's defense. The circuit court's decision denied the defendant his rights to due process. The only way the circuit court could have avoided abusing its discretion would have been to grant the funding necessary. The defendant lacked the financial means to secure expert assistance.

Again, the decision in *Evans* stands in stark contrast to this claim. Appellant was not indigent. App.'s Br. 72. Based on Appellant's claim, he was financially capable of securing treatment for PTSD from three different physicians, two Veterans Administrations physicians and one private physician. Tr. 203. Appellant could have developed this theory further. In fact, Appellant began developing a defense predicated on PTSD. The circuit court did not prevent this defense from being raised. Appellant decided to abandon it.

Evans does not support Appellant's assignment of error. In fact, that decision undermines the present claim. There is no evidentiary foundation, let alone a foundation which a sufficient actual need argument could be framed. There was no circuit court error. Appellant failed to raise this claim at trial, and denied the circuit court an opportunity to commit error.

To recap, Appellant waived appellate review by failing to raise this defense at trial. The defense was not presented to the circuit court, which in turn, undermines his assertion that circuit court abused its discretion. Finally, there are no facts in the record which would provide solid footing for Appellant's claim. This Court should reject Appellant's claim; and, deny him the relief he seeks.

CONCLUSION.

For the reasons stated above, the State respectfully requests that this Court affirm the circuit court, and deny Appellant the relief he seeks.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

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This the 24th day of July, 2013.

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